DOJ and FTC Antitrust Investigations

Thomas F. Bush, Smith, Gambrell & Russell LLP
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Two federal agencies, the **Antitrust Division** of the **Department of Justice** (DOJ) and the **Federal Trade Commission** (FTC), have broad authority to investigate possible violations of federal antitrust laws. In addition, most of the state attorneys general have authority to investigate and bring enforcement actions against violations of their states' antitrust laws, generally by procedures similar to those used by the DOJ.

This Note discusses investigations conducted by the two federal agencies before they start enforcement proceedings. It also details certain measures corporate counsel should consider in responding to a criminal investigation.

Commencement of the Investigation

The DOJ and the FTC receive information about potential antitrust violations from a variety of sources, including:

- Complaints from competitors, suppliers, or customers (see Practice Note, Raising Antitrust Merger Challenges: Third-Party Strategies: Complaining to the Federal Agencies).
- Applications for leniency for criminal offenses.
- Reports from current or former employees.
- Studies of particular industries.
- Premerger notifications under the **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (HSR Act).
- Referrals from other government agencies and law enforcement officials.
- Leads from foreign competition law enforcement agencies.
- Members of Congress.
- Monitoring private litigation.
- Press reports.

Initially, the agencies examine information from these sources and other publicly or readily available sources to determine whether to bring an investigation. The agencies may investigate transactions that have already closed.

Civil Versus Criminal Investigations

The type of investigation pursued by the agencies depends on the form of the suspected violation:

- **Civil investigations** (see Civil Investigations) involve all violations excluding cartels, but including the following types of conduct:
  - monopolization;
  - restraints imposed on distributors and dealers;
  - price discrimination;
  - mergers and acquisitions;
  - joint ventures;
  - horizontal agreements that do not fit the pattern of a hard-core cartel violation; and
  - agreements analyzed under the rule of reason.
- **Criminal investigations** (see Criminal Investigations) have historically involved cartels only, which are agreements among competitors to:
  - fix prices;
  - allocate markets or customers;
  - restrict production or sales; or
  - rig bids.

Under the Biden administration, however, the Antitrust Division announced a change in policy, indicating it intends to prosecute obvious and flagrant monopolization violations criminally as well (see, for example, DOJ: Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022)). And in October 2022, the Antitrust Division secured a guilty plea in a criminal attempted monopolization case (see DOJ: Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022)).

Civil Investigations

The DOJ and the FTC share responsibility for civil enforcement of the federal antitrust laws:

- The DOJ conducts civil enforcement by bringing lawsuits for:
  - injunctions against the continuation of illegal practices or the closing of an anticompetitive transaction; and
  - other forms of equitable relief, such as the unwinding of a merger or transaction.
- The FTC conducts civil enforcement by bringing administrative proceedings seeking cease-and-desist orders, which are similar to injunctions.

Before starting a lawsuit or administrative proceeding, each agency conducts a civil investigation to determine if an enforcement proceeding is warranted. During the investigation, they may also explore a settlement with the target, which would result in either a court issued consent decree, in the case of a DOJ investigation, or a consent order with the FTC. As a first step in any investigation, the two agencies carry out a clearance procedure to ensure that they do not pursue duplicative investigations (see Practice Note, Predicting the Investigating Agency for Merger Review).

In civil investigations, the agencies rely extensively on the voluntary submission of evidence and information from complainants and other sources such as customers, suppliers, and competitors of the target of the investigation. The target may also submit evidence and arguments to the investigating agency to support the legality of its conduct or for favorable terms in a consent decree or order. For more on the common tools the DOJ uses to obtain information in investigations, see Practice Note, DOJ Tools to Obtain Information: Overview.

For more on preliminary injunctions in FTC and DOJ merger challenges, see Practice Note, Preliminary Injunctions in FTC and DOJ Merger Challenges.

Civil Investigative Demands

In civil investigations, the process that both agencies primarily use to compel the production of evidence is a **civil investigative demand** (CID). A CID requires the recipient to do one or more of the following:

- Produce documents, including electronic documents, and tangible things.
- Provide written answers to requests for information.
- Answer questions under oath in an oral deposition.

CIDs function in a manner similar to the comparable discovery procedures in civil litigation. CIDs can also require production of materials obtained in discovery in private litigation. In such cases, the CID overrides any restrictions on disclosure found in protective orders entered in the litigation. The person that originally produced the discovery is also given notice and an opportunity to object.

In addition to CIDs, the FTC issues investigative subpoenas to compel document production and deposition testimony during its investigations. The subpoena operates essentially the same as a CID, except that a subpoena cannot compel interrogatory answers. The FTC has the further power to order companies or individuals to submit written reports on matters under investigation.

In investigations of mergers and acquisitions notified under the HSR Act, the agencies do not issue CIDs to the parties to the transaction. Instead, they issue each party a Request for Additional Information and Documentary Material, known as a **Second Request** (see Practice Note, Second Requests in Merger Investigations). These Second Requests suspend the running of the waiting period for closing the transaction until 30 days after the parties' substantially comply with the request. In investigations of consummated mergers and acquisitions, the agencies issue CIDs to the parties.

For more information on consummated merger enforcement actions, see Practice Note, Consummated Mergers Antitrust Enforcement. For a chart of consummated merger actions since 2001, see Consummated Mergers Antitrust Enforcement Chart.

Issuance and Service of a CID

CIDs are issued by the agencies without the need to petition a court. The standard for issuing a CID is very low: the agencies need only have reason to believe that a person or entity has possession, custody, or control of information relevant to its investigation (see Antitrust Civil Process Act § 3, 15 U.S.C. § 1312(a) and Federal Trade Commission Act § 20, 15 U.S.C. § 57b-1(c)(1)).

The CID must identify the conduct under investigation and the statutes involved. This description usually is phrased in very general terms, such as "monopolization of light bulbs in the United States in violation of Section 2 of the **Sherman Antitrust Act**."

CIDs are served on corporations usually by registered or certified mail. They are served on individuals by personal service on the individual or on an adult at his residence. Service is effective throughout the US. CIDs can be served outside the country if both of the following requirements are met:

- A US court would have jurisdiction over the corporation or individual served.
- Service is made by a method effective under the Federal Rules of Civil Procedure.

The DOJ's CIDs contain a notice stating that:

- Information provided in response to a CID may be used by the DOJ in other civil, criminal, administrative, or regulatory cases or proceedings (see Use and Disclosure of CID Materials).
- Individuals may refuse under the Fifth Amendment to the US Constitution to produce documents or answer any question that may tend to incriminate them.

(See DOJ Press Release, Antitrust Division Announces Updates To Civil Investigative Demand Forms And Deposition Process (Sept. 10, 2020).)

Compliance with a CID

A CID calling for production of documents and tangible things describes the requested items in a manner similar to a document request in a civil lawsuit and states a time for production. The agencies negotiate with respondents over the production of electronic documents, including search terms and technology-assisted review. The respondent must submit an affidavit with the production stating that it includes all items required by the CID that are in the respondent's possession, custody, or control.

A CID calling for an oral deposition identifies the witness to be deposed and states the date, time, and place of the examination, in the same manner as a notice of deposition in a civil action. A CID can require a deposition in any judicial district where the witness does one of the following:

- Resides.
- Transacts business.
- Is served with the CID.
- Agrees to appear.

The CID can also require the deposition of an organization, in a manner similar to Federal Rule of Civil Procedure 30(b)(6).

Counsel for the witness may attend and make objections on the record but does not have the right to examine the witness. Other witnesses and third parties are not permitted to attend the deposition.

DOJ attorneys taking oral testimony under a CID also question the witness on the record at the start of every deposition to confirm that the witness understands how the DOJ can use the information provided (see Use and Disclosure of CID Materials).

If the witness declines to answer a question by invoking the Fifth Amendment privilege against self-incrimination, the agencies can obtain a court order granting statutory immunity and compelling the answer (see Statutory Immunity).

The witness has the right, as in a lawsuit, to review, correct, and sign the transcript. Ordinarily, the witness may obtain a copy of his deposition, but the agency may deny a request for a copy for good cause. This can occur when the agency fears that the transcript may be used by targets of the investigation to formulate misleading or evasive answers in later depositions.

For information on how to prepare a witness for a deposition, see Preparing a Witness for Depositions in Merger Investigations Checklist.

Cooperating with the FTC

The FTC has stated that it expects companies and individuals receiving a CID or compulsory process to respond completely and in a timely manner, or to disclose quickly and candidly obstacles to full compliance (see FTC Blog Post, The FTC takes its subpoenas and CIDs seriously – and you should, too (March 6, 2019)). Parties concerned about their ability to comply fully and on time are required under the FTC's Rules of Practice to meet and confer with staff to identify any issues, problems, or concerns that might affect a party's ability to comply. A meet and confer may lead to:

- Limitation of some requests.
- Extension of the deadline for compliance.

In addition, FTC staff works with parties and their counsel to determine the scope of the CID and a timeframe for compliance.

The FTC advises parties to:

- Respond promptly on receipt of a subpoena or CID.
- Take advantage of a meet and confer by:
  - communicating concerns about their ability to comply;
  - bringing people who have knowledge about the required documents and information and the efforts needed to produce them; and
  - providing specific information.
- Immediately communicate concerns to the staff about meeting deadlines and keep in contact.

(See FTC Blog Post, The FTC takes its subpoenas and CIDs seriously – and you should, too (March 6, 2019).)

Enforcement of CIDs

If the recipient fails to comply with a CID, the agency can file a petition to enforce the CID in federal court. The FTC typically seeks to compel compliance only after the subpoena or CID

recipient fails to meet its obligations after a reasonable extension and when cooperation has broken down. The FTC has filed actions in federal court against process recipients failing to comply fully with the agency's subpoenas and CIDs by:

- Failing to respond at all.
- Responding with less than full cooperation.
- Ignoring the FTC's deadlines.

(See, for example, FTC Blog Post, The FTC takes its subpoenas and CIDs seriously – and you should, too (March 6, 2019).) In October 2023, for example, the FTC filed suit to enforce Total Wine & More's compliance with a third-party CID as part of the FTC's investigation into whether Southern Glazer's Wine & Spirits LLC's sales practices violate the Robinson-Patman Act or Section 5 of the FTC Act. According to the FTC, Total Wine failed to comply with the CID for over four months in refusing to search employee-maintained files for documents needed for the FTC's investigation without providing a valid justification (see FTC Press Release, FTC Takes Total Wine to Federal Court to Enforce Compliance with Antitrust Civil Investigative Demand (Oct. 20, 2023)).

Similarly, in October 2020, the DOJ filed suit to enforce Bain & Company's compliance with a third-party CID as part of the DOJ's investigation into Visa, Inc.'s proposed acquisition of Plaid Inc. The DOJ alleged that Bain withheld important documents demanded under the CID by asserting unsupported privilege claims, which hindered the DOJ's investigation. The DOJ sought to enforce the CID under Section 1314(a) of the Antitrust Civil Process Act (see DOJ Press Release, Justice Department Files Enforcement Action Against Bain & Company As Part of Its Investigation Into Visa Inc's Proposed Acquisition of Plaid Inc. (Oct. 27, 2020)). The DOJ dismissed its petition on November 9, 2020, after it filed suit in the Northern District of California to block Visa's acquisition of Plaid.

CIDs can be very broad in scope. Courts allow an agency to enforce CIDs so long as the agency has statutory authority to conduct the investigation and the materials requested are not plainly irrelevant to the investigation. Both the DOJ and the FTC negotiate with recipients to narrow the scope of CIDs and to extend the deadline to respond.

The recipient may seek an order modifying or quashing a CID on various grounds including privilege, relevance, or unreasonable burden. If the CID is from the DOJ, the order to modify or quash must be requested by an action filed in federal court. If the CID is from the FTC, the order must be requested from the FTC. In both situations, the recipient must act promptly; the request to quash or modify must be made within 20 days of receipt of the CID, or before the return date if earlier. Filing a petition to modify or quash suspends the time period for responding to those portions of the CID subject to the objections. The FTC has stated that it will direct the Office of General Counsel to begin enforcement proceedings within 30 days of any established deadline under any FTC order adjudicating a petition to limit or quash subpoenas or CIDs (see FTC Blog Post, The FTC takes its subpoenas and CIDs seriously – and you should, too (March 6, 2019)).

Use and Disclosure of CID Materials

The DOJ and the FTC can use evidence and information obtained from a CID in any court case or administrative proceeding in which the DOJ or the FTC is involved, whether or not the

proceeding is related to the investigation. This use can result in the public disclosure of the CID materials.

Except for these circumstances, the agencies keep CID materials confidential from third parties. CID materials are not subject to disclosure under the **Freedom of Information Act** (FOIA). The DOJ may also use CID materials in grand jury investigations, which are confidential proceedings.

For sample language counsel can use in a cover email or letter to the DOJ to ensure that CID materials submitted to that agency are treated as confidential to the extent required by law, see Standard Clause, Confidentiality Language: Compulsory Disclosures to the DOJ in Merger Investigations. For similar language counsel can use in a cover email or letter to the FTC, see Standard Clause, Confidentiality Language: Compulsory Disclosures to the FTC in Merger Investigations.

Criminal Investigations

Criminal enforcement of the federal antitrust laws is the exclusive responsibility of the DOJ. For decades, the DOJ's policy has been to bring criminal enforcement actions only against express agreements among competitors to fix prices, allocate customers, or rig bids and other hard-core cartel agreements. Under the Biden administration, however, the Antitrust Division announced a change in this policy, indicating it intends to prosecute monopolization and attempted monopolization criminally as well (see, for example, DOJ: Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022)).

For criminal offenses, the DOJ typically seeks the following criminal penalties:

- Fines for corporate defendants.
- Fines and imprisonment for individual employees who participate in a cartel.

(See Practice Note, Criminal Antitrust Enforcement in the US: Potential Criminal Penalties.)

The DOJ investigates and prosecutes not only violations of the antitrust laws but also other criminal violations arising from the cartel (such as conspiracy and wire fraud) or from the investigation itself (such as obstruction of justice, perjury, and false statements). For information about those types of charges, see Practice Notes:

- Conspiracy Charges: Overview.
- Mail and Wire Fraud Under 18 U.S.C. §§ 1341, 1343, and 1346.
- Obstruction of Justice: Overview.

CIDs are not used in criminal investigations. However, materials produced in response to CIDs issued in other investigations can be used. For the criminal investigation, the DOJ relies primarily on the following four investigatory tools, used with the assistance of the Federal Bureau of Investigation (FBI):

- Search warrants.
- Interviews.
- Wiretaps.

- Grand jury subpoenas.

In addition to these investigatory tools, the DOJ frequently has the benefit of the confidential assistance of one or more participants in an alleged cartel. As a result of the DOJ's corporate leniency policy, participants in an illegal cartel have a strong incentive to report the cartel to the DOJ, confess their participation, and assist the DOJ in its investigation (see Practice Note, Leniency Program for Antitrust Violations). Guilty plea agreements entered during the course of the investigation almost always include a requirement that the corporation or individual making the plea assists the DOJ in investigating other targets. For more on the common tools the DOJ uses to obtain information in investigations, see Practice Note, DOJ Tools to Obtain Information: Overview.

When a company learns it may be a target of a criminal investigation by the DOJ, corporate counsel should immediately:

- Implement a preservation order for all documents potentially relevant to the investigation. This can help avoid penalties for obstruction of justice (see Obstruction of Justice).
- Retain counsel to represent the company.
- Start an internal investigation of the potential violation (see Conducting Internal Corporate Investigations Toolkit).

The company should also instruct employees on how to deal with the investigation (see Box, Instructions and Warnings to Employees on Learning of a Criminal Investigation).

Search Warrants

The DOJ uses search warrants to seize evidence of illegal cartels, particularly evidence that the cartel members might destroy or conceal once they learn of the investigation, such as records of communications between cartel members. The search warrant authorizes FBI agents to enter certain premises and seize the items specified in the warrant. The DOJ typically uses search warrants early in an investigation, before using other investigatory tools, like interviews or grand jury subpoenas, that might reveal the investigation to the targets.

To obtain a search warrant, the DOJ must present to a federal magistrate judge testimony or an affidavit showing probable cause to believe that a crime has been committed and that evidence of the crime can be found at the location to be searched. Frequently, probable cause is based on information supplied by a leniency applicant. The magistrate judge keeps a record of the testimony and evidence submitted to show probable cause, which can then be examined if a defendant subsequently moves to suppress the evidence seized under the warrant.

The search warrant must state with particularity the premises to be searched and the evidence or property to be seized. The FBI is authorized to execute the search and seizure, within the scope specified in the warrant and within a specified period of time, no longer than 14 days from issuance. The search must be conducted between 6:00 a.m. and 10:00 p.m., local time, unless a judge has expressly permitted execution at a different time for good cause. The officers executing the warrant must prepare an inventory of the items seized.

At the end of the search, the agent typically serves a grand jury subpoena commanding production of the documents and items described in the warrant. As a consequence, the company

searched must turn over any documents described in the subpoena that the agents overlooked in their search or that are maintained at a different location.

A search warrant can authorize the search and seizure of electronic records. In these cases, the agents might search computers and networks on the premises and take away copies. In many situations, a search on the premises is not deemed practical, and the agents remove the computers or media for an off-site search. The search warrant can authorize an agent to access electronic files stored on a server in a different location. The DOJ's policy is not to seize files stored on servers located outside the US.

A person who owns or controls the premises to be searched or the items to be seized has a right to:

- Receive a copy of the warrant.
- Be present when the inventory is prepared.
- Receive a copy of the inventory.

Companies should ensure that employees know how to respond to a search warrant (see Box, Instructions to Employees: Search Warrants).

Interviews

In a criminal investigation, the DOJ can compel a witness to answer questions by serving him with a subpoena to testify before a grand jury or at a trial. Outside of those proceedings, the DOJ cannot compel any person to answer questions. In particular:

- Employees present during the execution of a search warrant can decline to answer questions.
- No person can be required to sit for a private interview with DOJ lawyers or FBI agents without his consent.

Witness interviews, nonetheless, are an important investigatory tool in cartel investigations. Witness consent to an interview is obtained in a variety of ways, outlined below.

Amnesty Grants and Guilty Pleas

Employees of leniency applicants who wish to take advantage of the grant of amnesty must cooperate with the DOJ's investigation. The required cooperation generally includes a thorough and candid interview. Guilty plea agreements almost always require an interview.

Assisting the DOJ's Investigation

A witness may agree to an interview out of a willingness to assist with the enforcement of the antitrust laws or a more basic desire to persuade the DOJ not to indict him. A witness that fears prosecution might agree to an interview only if accompanied by counsel and granted immunity from prosecution based on the contents of the interview or any evidence derived from it (see Letter Immunity). The DOJ is usually reluctant to agree to such immunity, but it may agree after considering the importance of the witness' answers and the likelihood that the witness will become a target of the investigation.

Drop-In Interviews

The DOJ frequently receives the benefit of drop-in interviews, in which FBI agents simply approach a suspected cartel participant in an unexpected place, often at home before the person has left for work, and start asking questions. The agents may reveal certain details about the cartel, obtained from a leniency applicant, and suggest that the cartel has been exposed and that the interviewee would be better off with a full confession on the spot. Drop-in interviews can result in the interviewee making incriminating statements, particularly due to:

- The surprise of the approach.
- A fear of prosecution and imprisonment.
- Uncertainty over the right to refuse to answer.
- The skills of the FBI agents who conduct these drop-in interviews.

To ensure surprise, FBI agents frequently conduct drop-in interviews simultaneously on multiple persons and at the same time that other agents execute search warrants. The agents executing search warrants may also attempt to question employees at the premises being searched. These employees cannot be required to answer, but they might nonetheless respond to questions out of surprise or fear. With international cartels, these activities may be conducted at the same time that foreign competition law authorities conduct dawn raids (on-site investigations at a company's premises) on overseas targets.

The target of a drop-in interview, or an employee who is questioned during the execution of a search warrant, can decline to answer any questions. The risks involved in answering questions in these settings are substantial:

- A risk of giving answers that incriminate the interviewee and his employer.
- The danger of prosecution for false statements or obstruction of justice, as a result of an answer that the DOJ believes to be false or misleading.
- The absence of counsel.
- The lack of a record of the interview for the interviewee or the employer.
- The loss of an opportunity to request immunity before answering questions.

As a result of these risks, employees should be advised to refuse to answer questions when confronted by the agents (see Box, Instructions to Employees: Drop-In Interviews and see Preparing for and Responding to a US Antitrust Raid Checklist).

Wiretaps

The DOJ occasionally uses wiretaps (secret interceptions of personal conversations, telephone conversations, or electronic communications) to record incriminating statements of cartel participants. Some prominent cartel prosecutions have relied on recordings of competitors expressly agreeing to fix prices.

The DOJ can obtain a court's authorization to execute wiretaps for antitrust violations without the consent of any participant. To obtain a court-ordered wiretap, the DOJ must present the court with evidence meeting several requirements, including probable cause that the target of the wiretap has committed or is about to commit a criminal offense and that conversations

concerning the offense will be obtained by the wiretap. Information from leniency applicants can supply the foundation for an order authorizing a wiretap.

Applications and orders for wiretaps are kept under seal by the courts. Targets of cartel investigations usually do not know if their communications have been recorded until the wiretap is disclosed in the course of a criminal prosecution.

Grand Jury Subpoenas

The primary body for investigating criminal antitrust violations is the grand jury, a group of 16 to 23 persons selected randomly from the local voting rolls, who meet periodically to hear evidence presented by DOJ prosecuting attorneys and then vote on whether to issue indictments recommended by the prosecutors. The grand jury is assembled in a judicial district where venue over any resulting prosecution can be established.

Subpoenas for Documents

To compel the production of documents and physical evidence, including electronic records, the grand jury issues a subpoena *duces tecum* to either an entity or an individual. The subpoena commands the recipient to produce specified documents on a particular date on which the grand jury is sitting. The subpoena requires the production of all responsive documents and items within the recipient's possession or control, including computer files on servers that the recipient can access. The DOJ's policy is not to require the production of computer files on servers located outside the US in response to a grand jury subpoena, but it might require the production of files on foreign servers as part of the cooperation required for a plea agreement.

The terms of the subpoena *duces tecum* require production of the documents in the grand jury room by an individual respondent, or in the case of a corporate respondent, a person appointed by the company as custodian. At the time of production, DOJ attorneys can question the individual or the custodian about the scope of the search for responsive documents and the completeness of the production. However, DOJ attorneys commonly dispense with this process and agree to accept production at their offices. In that case, the DOJ requires the submission of an affidavit concerning the search and the completeness of production. If any questions arise about the production, the person submitting the affidavit may be called to testify at a later time.

The DOJ negotiates with recipients over the scope and the return date of the subpoena *duces tecum*. If a party believes that a subpoena is unreasonably burdensome and cannot negotiate a satisfactory compromise with the DOJ, it can file a motion to quash or modify the subpoena in the federal district court for the district in which the grand jury is sitting.

Subpoenas for Testimony

A subpoena *ad testificandum* requires the recipient to appear before the grand jury and testify. It may also require a witness to give an exemplar, such as a handwriting sample. Witnesses subpoenaed to testify in person are entitled to witness fees and certain travel expenses. Witnesses appear before grand juries without counsel in the room, but they may step out of the room to consult with counsel during the course of their testimony. For more on grand jury witness testimony, see Practice Note, Antitrust Grand Jury Witness Testimony: Overview.

Service of Subpoenas

Grand jury subpoenas are served by personal delivery of the subpoena to any person or entity in the US, with a check for mileage and witness fees for subpoenas *ad testificandum*. Subpoenas also can be served outside the country on citizens or residents of the US.

Non-citizens cannot be served with a grand jury subpoena outside the US. When the DOJ wishes to obtain the testimony of a non-citizen, it either requests the person's voluntary appearance before the grand jury or serves a subpoena when the person is in the country. Border watches by US Immigration and Customs Enforcement alert the DOJ to the person's presence in the country.

Disclosure of Grand Jury Proceedings

A grand jury proceeding is conducted in secret. The prosecuting attorneys and the grand jury cannot disclose the proceedings to the public. Witnesses, however, can disclose their appearances and their submissions to a grand jury. The issuance of subpoenas discloses the existence of the investigation to the recipients of the subpoenas, who may disclose the investigation to the public.

The Privilege Against Self-Incrimination and Immunity

Under the Fifth Amendment to the US Constitution, no person can be compelled to give self-incriminating testimony. Persons subpoenaed to appear before a grand jury investigating a cartel can refuse to testify if they believe that the DOJ could use their testimony to prosecute them for participating in the cartel or for any other criminal offense. Witnesses also can refuse to produce documents to the grand jury. Although pre-existing documents are not protected by the Fifth Amendment, a witness' production of incriminating documents can be the equivalent of testimony admitting that the documents exist or are in the witness' possession.

The Fifth Amendment privilege against self-incrimination is not available to corporations. A corporation cannot claim the privilege to avoid compliance with a subpoena *duces tecum*.

The DOJ can overcome the Fifth Amendment by obtaining a witness' agreement to waive the privilege. A person who agrees to assist the investigation as part of a grant of leniency or a guilty plea agreement waives his privilege.

For more information, see Practice Note, Fifth Amendment Protection Against Self-Incrimination.

Statutory Immunity

The DOJ can also overcome the Fifth Amendment privilege by seeking an order from a federal district court compelling the witness to testify under immunity (18 U.S.C. § 6003). This process, known as statutory immunity, bars the federal government and all states from any use of the compelled testimony, and use of any evidence or information derived directly or indirectly from the testimony, in any criminal prosecution of the witness, other than a prosecution for perjury or false testimony in the compelled testimony (18 U.S.C. § 6002). Because statutory immunity removes the threat of incrimination, the witness no longer has grounds to claim a Fifth Amendment privilege. Statutory immunity can also be granted to compel testimony from a witness who invokes the privilege in response to a CID.

After obtaining testimony under statutory immunity, successful prosecution of the witness is very difficult, often impossible. Consequently, the DOJ does not seek immunity unless it

concludes that a witness' testimony is essential to the prosecution of other, more culpable individuals. If the DOJ is able to obtain essential testimony from witnesses who have waived their Fifth Amendment privileges in connection with a grant of leniency or a plea agreement, it may decide not to seek immunity for any witness.

For more information, see Practice Note, Immunity: Statutory Immunity.

Letter Immunity

As an alternative to statutory immunity, the DOJ can issue the witness a letter agreeing not to make any use of the witness' testimony or any evidence or information derived from the testimony in a criminal prosecution against that witness, in return for the witness' agreement to testify. This process, known as informal immunity or letter immunity, is less burdensome on the DOJ, because no court order is required.

However, while letter immunity offers less protection to the witness:

- It does not bar states from using the testimony in a prosecution.
- The scope of the immunity often is defined narrowly to cover only the suspected criminal conduct under investigation.

Because of these limitations, letter immunity is not sufficient to overcome a witness' Fifth Amendment privilege, and no witness can be compelled to testify in return for mere letter immunity. In particular circumstances, a witness may decide that letter immunity offers sufficient protection and agree to accept it and testify.

The DOJ cannot obtain statutory immunity to compel a person to sit for an interview. It may, however, give letter immunity in return for the person's consent to an interview.

For more information, see Practice Note, Immunity: Letter or Informal Immunity.

Separate Counsel for Employees Under Criminal Investigation

Employees who are potential targets of a criminal antitrust investigation usually require the assistance of counsel before they decide whether to sit for an interview, testify before the grand jury, or otherwise cooperate with the DOJ's investigation. In most cases, conflict of interest rules prevent the employer's counsel from also representing the individual employees who are potential targets of the investigation. A company facing a criminal investigation can recommend and pay for separate counsel for its employees if it wants the employees to coordinate with the company in responding to the investigation and particularly if it wants the employees to cooperate with the investigation.

For more information, see Conducting an Internal Investigation Checklist: Determine Whether to Retain and Pay for Individual Counsel for Employees.

Penalties

A failure to comply with compulsory processes in a government antitrust investigation, or an effort to interfere with the investigation, can lead to a range of penalties.

Contempt

A US district court can punish the failure to comply with compulsory processes as contempt of court. In antitrust investigations, contempt is potentially available in two circumstances:

- Failure to comply with a CID, after a district court has issued an order enforcing the CID.
- Failure to comply with a grand jury subpoena.

Following a refusal to comply, the court's initial response usually is to impose civil contempt. The respondent can avoid this penalty by complying with the process. For example, a witness who refuses to testify can be jailed until he agrees to testify. A corporation that refuses to produce documents can be fined a certain amount for each day that it refuses to make the production.

If civil contempt fails to secure compliance, the court can refer the matter to the DOJ for prosecution for criminal contempt, which can lead to significant fines and a prison sentence.

For more information, see Practice Note, Immunity: Contempt.

Perjury

A witness who knowingly gives a false statement under oath about a matter material to the investigation faces prosecution for perjury. This carries penalties of fines and imprisonment for up to five years. Subornation of perjury, which is the procurement of another person to commit perjury, carries the same penalties.

In antitrust investigations, a charge of perjury can arise from false statements made in the following situations:

- Deposition testimony in response to a CID.
- Interrogatory answers given in response to a CID.
- A certification of compliance with a document request in a CID.
- Testimony before a grand jury.
- An affidavit of compliance with a grand jury subpoena *duces tecum.*

False Statements

The offense of false statements is committed when a person misleads a government investigator about a fact material to the investigation. The misleading conduct can consist of any of the following:

- Making a statement to investigators, which need not be under oath, about a material fact that the person knows to be false.
- Taking affirmative steps to conceal material facts from the investigators.
- Preparing or submitting documents that the person knows to contain false information.

The penalties for false statements include fines and imprisonment for up to five years.

A person does not commit this offense by refusing to answer questions or by failing to volunteer information. Unless compelled to give a deposition by a CID, or to give grand jury testimony by

a subpoena, no person has an obligation to answer an investigator's questions or volunteer information to investigators. The risk of a false statements charge arises only when a person answers questions or provides information and fails to be completely truthful.

Obstruction of Justice

A person faces charges of obstructing justice when he intentionally attempts to influence, obstruct, or impede the due administration of justice (18 U.S.C. § 1503). Penalties include fines and imprisonment for a maximum of ten years. A person commits obstruction of justice when all the following apply:

- A federal judicial proceeding is ongoing, which can be a grand jury investigation.
- The person knows or has reason to know of the proceeding.
- The person takes some action with the intention of interfering with the process of that proceeding arriving at an appropriate outcome.

Examples of actions that can constitute obstruction include:

- Destroying or altering documents that have been or are expected to be subpoenaed by a grand jury.
- Removing from the US documents that have been or are expected to be subpoenaed by a grand jury.
- Trying to conceal information relevant to a grand jury investigation.
- Attempting to persuade a grand jury witness to provide false, misleading, or evasive testimony.
- Providing false testimony to a grand jury in an effort to impede the investigation.
- Making false statements to a DOJ attorney to avoid being called to testify before a pending grand jury.

The same conduct can constitute both obstruction of justice and another offense. For example, false testimony can support charges of both obstruction and perjury.

Intentional interference with a civil investigation by the DOJ or the FTC is also obstruction of justice, carrying penalties of fines and imprisonment up to five years (18 U.S.C. § 1505). Criminal penalties can follow the destruction or concealment of documents sought by a CID or the solicitation of false testimony from a witness testifying in response to a CID.

For more information, see:

- Practice Note, Obstruction of Justice: Overview.
- Practice Note, Obstruction of Justice Under 18 U.S.C. §§ 1505, 1512, and 1519.
- Obstruction of Justice Statutes Comparison Chart.

Instructions and Warnings to Employees on Learning of a Criminal Investigation

On learning of a criminal investigation, a company should provide the following instructions and warnings to employees:

- Strictly follow all orders regarding preservation of documents.
- Do not create new documents or alter existing documents for the investigation.
- Do not discuss the investigation:
  - with persons outside of the company; or
  - with other employees.
- Cooperate fully with corporate counsel.
- Report all contacts from government investigators.
- Employees located overseas with potential knowledge should delay travel to the US, until discussed with counsel (see Service of Subpoenas).

Instructions to Employees: Search Warrants

If the FBI executes a search warrant at a company's premises, employees should be given the following instructions:

- One person, counsel if available, serves as lead, and all other employees vacate the area, except as requested by the lead to help observe.
- The lead notifies corporate counsel immediately.
- Ask for a copy of the search warrant and review it.
- Ask for the agents' identification.
- Allow the agents to conduct their search, and to seize any items, without any interference.
- Do not attempt to hide, destroy, or alter any documents or computer records.
- You do not have to answer an agent's questions.
- Observe the search and keep notes of rooms, files, and computers searched.
- Request a copy of every document taken.
- Observe the preparation of the inventory and accept a copy.
- Accept service of any subpoena.

Instructions to Employees: Drop-In Interviews

The following instructions should be provided to employees in case an FBI agent attempts to conduct a drop-in interview:

- Say that you wish to talk with counsel before answering any questions.
- You are not obligated to answer any questions before talking to a lawyer.
- Notify company counsel immediately.
- Beware of agents' tactics to elicit information. Examples of leading questions commonly used by agents include:
    - "I have just a few background questions."
    - "You will help yourself by answering my questions."
    - "Can you confirm some information that we have received from others."